

Formal Action #5112

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,

Plaintiff,

v.

PRO DESIGN & VENDING

TECHNOLOGIES, INC. A/K/A

MEDI-KWIK PLUS, a New

Hampshire Corporation,

Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE ("Assurance") is given by PRO Design & Vending Technologies, Inc., also known as Medi-Kwik Plus of Salem, New Hampshire ("Respondent"), to Charles W. Burson, Attorney General and Reporter for the State of Tennessee ("Attorney General").

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division of Consumer Affairs of the Department of Commerce and Insurance (the "Division") and the Attorney General conducted an investigation of Respondent's specific business practices at the Business Opportunity and Franchise Show held at the Nashville Convention Center on October 26-27, 1996 in Nashville, Tennessee. These practices include: (a) failure of the Respondent's sales representatives to disclose information necessary for consumers to make informed purchasing decisions, and (b) making representations regarding the earning potential of Respondent's business opportunity to consumers without providing appropriate substantiation. Respondent's business practices are more fully described in the accompanying Petition. As a result of the investigation, the Division and the Attorney General determined that certain acts and practices of Respondent violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.* (the "Act").

B. Respondent denies any wrongdoing. Respondent emphasizes that it is in good standing in all registration states that it is currently doing business in throughout the country. Respondent entered the show in Nashville, Tennessee in good faith with the knowledge that its literature was approved by the state of Washington who follows F.T.C. guidelines are that there have never had any problems with its presentation in any other state it has done business in. Respondent further emphasizes that this Assurance is not considered an admission pursuant to Tenn. Code Ann. § 47-18-107(c). The State's position is stated in Paragraph A, above.

C. Therefore, pursuant to Tenn. Code Ann. § 47-18-107, Respondent desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the expense of litigation.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. § 47-18-107, Respondent gives, and the Attorney General accepts, the following assurances:

1. BUSINESS PRACTICES

Accordingly, it is hereby agreed that upon approval of the Court, Respondent shall be permanently and forever enjoined and bound from directly or indirectly engaging in the practices set forth herein:

1.1 Respondent shall not directly or indirectly engage in any unfair or deceptive acts or practices in the conduct of its business. Respondent shall fully abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.*, including but not limited to §§ 47-18-104(a), (b)(3), (b)(5), (b)(12) and (b)(27), which prohibit unfair and deceptive acts and practices.

1.2 Respondent shall fully comply with all provisions of the FTC Franchise Rule, 16 C.F.R. § 436.1, *et seq.*

1.3 Respondent shall not directly or indirectly, provide information, estimates, approximations and/or representations regarding the potential income and/or earnings, which may result from the purchase, ownership and/or operation of Respondent's business opportunity or franchise, without complete and accurate substantiation for each such claim at the time any such claims are made. Complete and accurate information, in the context of this paragraph, refers to at a minimum, the information required by the FTC Franchise Rule.

1.4 When using in any solicitation the word "free" or any word or phrase of similar import, all the terms, conditions, and obligations shall be clearly and conspicuously disclosed by Respondent in close proximity to the offer of "free" goods, services or merchandise. Further, when using in any solicitation the word "free", or any word or phrase of similar import, Respondent shall fully comply with all applicable provisions of the Tennessee Consumer Protection Act, applicable rules, regulations and guidelines of the Federal Trade Commission (including specifically § 16 C.F.R. 251), and all other applicable state or federal laws, regulations or rules.

1.5 Respondent shall fully comply with Tenn. Code Ann. § 47-18-120 when offering a prize, gift, award, incentive promotion or thing of value to a consumer.

1.6 Respondent shall review any employee's or agent's record if Respondent receives two or more complaints or other reliable information indicating that an employee or agent has made any misrepresentation to a consumer, or otherwise violated any provision of this Assurance. Respondent shall promptly discipline employees or agents for such misconduct and review all purchases of franchise or business opportunities involving that employee or agent to ensure that no violations to this Assurance occurred. Further Respondent shall report any such findings to the Attorney General within two days of discovery if the conduct occurred within the State of Tennessee or involved a Tennessee consumer.

1.7 Respondent shall conduct and provide training sessions and a written training manual regarding the Act and where applicable the Franchise Rule to all of Respondent's employees and/or representatives who are responsible for and/or involved with the selling and/or promoting of franchise and/or business opportunities in Tennessee. Training sessions shall specifically include information designed to educate all such employees about the requirements of the Tennessee Consumer Protection Act and where applicable the Franchise Rule, and to ensure that they are aware of all of the requirements, including, but not limited to, the obligation to provide full and complete disclosure in accordance with the Tennessee Consumer Protection Act to interested consumers. These training sessions shall also specifically include

information regarding Respondent's policy prohibiting unsubstantiated earnings claims during conversations with interested consumers. Within sixty days of execution of this Assurance, Respondent shall provide to the Attorney General a copy of all training materials provided to its employees and an affidavit stating and certifying that the employee training session and materials have been provided to all employees responsible for and/or involved in the selling or promoting of franchises and/or business opportunities to consumers in Tennessee along with a copy of Respondent's procedure for ensuring that all new employees receive appropriate training and the training materials in the future prior to engaging in sales activities on behalf of the Respondent. "Training materials" includes, but is not limited to, correspondence, memoranda, company literature and/or brochures, which provide information regarding the sale of Respondent's business opportunities or franchise. Alternatively, Respondent having indicated that it no longer intends to sell or market its business opportunity in Tennessee, Respondent may within sixty days of the execution of this Assurance, certify in writing to the Attorney General that it does not intend to sell or promote its business opportunity in Tennessee. Should Respondent later decide to re-enter Tennessee, it will undertake the obligations of this section prior to conducting business in Tennessee.

1.8 Respondent shall not, directly or indirectly, make any representation(s) to consumer(s) that a transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law in violation of Tenn. Code Ann. § 47-18-104(b)(12).

1.9 Respondent shall not represent or imply to consumers that a consumer operating a franchise or business opportunity will not need to pay appropriate federal, state or local taxes. Specifically, when referring to the benefits of Respondent's cash operated business or franchise opportunity, Respondent shall clearly and conspicuously inform consumers that they must pay appropriate federal, state and local taxes when operating that business or franchise.

1.10 Respondent shall not directly or indirectly represent earnings that can be expected without clearly and conspicuously disclosing either that Respondent is not guaranteeing that consumers that purchase Respondent's business opportunity or franchise will obtain those earnings or providing substantiation for the earning claims. Without limiting the scope of this provision, Respondent shall be prohibited from statements such as "you can earn \$94,000.00 per year by working only 1 day per month if you own 50 machines" or "you only need to make 3 sales a day at a machine to made a profit." unless Respondent has available substantiation for these statements which provide sufficient information for consumers to evaluate how likely it is that they will be able to achieve these amounts of earnings. Respondent shall prominently display all such substantiation materials to consumers.

1.11 Respondent shall not represent or imply that consumers have no liability risk associated with the business when such is not the case.

1.12 Respondent shall not assert that the "deep pocket" medicine makers would be responsible if anything went wrong with the medicines dispensed by Respondent's product without also disclosing that the purchaser of Respondent's business opportunity might also be liable for any such claims and that the

purchaser might have an action for indemnity against the maker of the medicine.

1.13 Respondent shall not represent or imply that income derived from Respondent's business need not be reported to the appropriate federal, state or local taxing entities. Without limiting the scope of this provision, for example, Respondent shall not place quotation marks around the word "reported" referring to income in their materials.

1.14 When promoting Respondent's business, if Respondent indicates that one of the benefits is that it is a "cash" business, Respondent shall not represent or imply that a benefit would be that a consumer would not need to pay appropriate federal, state or local taxing entities.

2. JURISDICTION

2.1 Jurisdiction of this Court over the subject matter herein and over the person of the Respondent for the purposes of entering into and enforcing this Assurance and Agreed Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling the State to apply such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and Agreed Order, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof. Respondent agrees to pay all court costs and attorneys' fees and any costs associated with any petitions to enforce any provision of this Assurance and Agreed Order against Respondent.

3. RESTITUTION REPRESENTATION

3.1 Respondent represents and warrants that no one who attended the franchise/business opportunity show which was held in Nashville, Tennessee on October 26-27, 1996, purchased a franchise, business opportunity or any goods or services from the Respondent. Therefore, no consumers in Tennessee are due restitution. The Respondent understands that the State expressly relies upon these representations and if said representations are false, incorrect or misleading in any way the State may move to vacate or set aside this Assurance and Agreed Order or request that Respondent be held in contempt.

4. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

4.1 Respondent shall pay the sum of One Thousand and 00/100 Dollars (\$ 1,000.00) to the State of Tennessee for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Said payment shall be made as set forth in Paragraph 6.

5. OTHER PAYMENT TO THE STATE

5.1 Respondent shall pay the sum of Five Hundred and 00/100 Dollars (\$500.00) to the State of Tennessee for consumer education purposes at the sole discretion of the Director of the Division of Consumer Affairs.

5.2 Respondent shall pay the sum of Five Hundred and 00/100 Dollars (\$500.00) which shall be designed for the General Fund of the State of Tennessee.

5.3 Respondent shall make the payments called for in this part as set forth in paragraph 6.

6. FORBEARANCE ON EXECUTION AND DEFAULT

6.1 No execution or garnishments to collect the monetary payments set forth in sections 4 and 5 of this Assurance of Voluntary Compliance shall issue so long as the Respondent makes timely payments as set forth in section 6.2. The payments shall first be applied to attorneys' fees and costs and once this obligation is complete the remaining payments shall be applied to consumer education and then to the civil penalty. In the event Respondent fails to make any such payment with thirty (30) days of its due date, the entire balance of all provisions of this Assurance and Agreed Order then remaining may be collected by execution, garnishment or other legal process, together with interest pursuant to Tenn. Code Ann. § 47-14-121, from the date of entry of this Assurance and Agreed Order.

6.2 Payments required by this section shall be delivered to the Attorney General or his designated representative as follows: One Hundred Dollars and No Cents (\$100.00) per month on February 5, 1997 and March 5, 1997, and thereafter Two Hundred Dollars and No Cents (\$200.00) per month beginning on April 5, 1997 and continuing on the 5th day of each month thereafter until paid in full. Each payment shall be by check and made payable to the State of Tennessee.

6.3 Respondent shall be required to retain proof of all payments to the State in the form of canceled checks for each payment for a full 24 months following its final payment to the State. Respondent shall provide proof of all payments to the State withing 10 days of a request for such information.

7. MONITORING AND COMPLIANCE

7.1 Upon request, Respondent agrees to provide books, records and documents to the State at any time, and further, to informally or formally under oath, provide testimony and other information to the State relating to compliance with this Assurance. Respondent shall make any requested information available within one (1) week of the request, at the Office of the Attorney General or at any other location within the State of Tennessee that is agreeable to Respondent and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

8. PRIVATE RIGHT OF ACTION

8.1 Pursuant to Tenn. Code Ann. § 47-18-109, nothing in this Assurance shall be construed to affect any private right of action that a consumer may hold against Respondent.

9. PENALTY FOR FAILURE TO COMPLY

9.1 Respondent understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is *prima facie* evidence of a violation of the Tennessee Consumer Protection Act.

9.2 Respondent understands that any knowing violation of the terms of this Assurance is punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties and sanctions, including but not limited to contempt sanctions and the imposition of attorneys' fees and civil penalties. Respondent agrees to pay all court costs and attorneys' fees associated with any petitions to enforce this Assurance and Order against the Respondent.

10. VENUE

10.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

11. REPRESENTATIONS AND WARRANTIES

11.1 Respondent represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations, and that Respondent believes that the Assurance and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Assurance in good faith.

11.2 Respondent represents that signatories to this Assurance have authority to act for and bind the Respondent.

11.3 Respondent will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts set forth and prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

11.4 Neither Respondent nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.

11.5 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's advertising or other business practices.

11.6 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of its officers, directors, employees and any third parties who act directly or indirectly on behalf of the Respondent as an agent, independent contractor or who are, involved in conducting business in the State of Tennessee. Within forty-five (45) days of entry of this Assurance, Respondent shall provide the State with an affidavit verifying and certifying that all required persons have been supplied with a copy of this Assurance.

11.7 Respondent warrants and represents that it is the proper party to this Assurance and Order. Respondent further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading or inaccurate, the State may move to vacate or set aside this Assurance and Agreed Order, and may request that Respondent be held in contempt.

11.8 Pro Design & Vending Technologies, Inc. represents that it is the true legal name of the entity entering into this Assurance of Voluntary Compliance and Agreed Order. Respondent understands that the State expressly relies upon this representation and if this representation is false or misleading, the State may move to vacate or set aside this Assurance and Agreed Order, and may request that Respondent be held in contempt.

11.9 This Assurance and Agreed Order may only be enforced by the parties hereto.

11.10 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

11.11 This document shall not be construed against the "drafter" because both parties participated in the drafting of this document.

11.12 This Assurance and Agreed Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition.

11.13 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Assurance shall not bar the State or other governmental entity from enforcing laws, regulations or rules against Respondent.

11.14 This Assurance shall be binding and effective against Respondent upon Respondent's signing the Assurance.

11.15 Respondent has been advised of its right to legal counsel in connection with this matter. By declining to obtain the assistance of legal counsel, Respondent has expressly waived its right to counsel by executing this Assurance.

11.16 Respondent has been advised that the Attorney General, Charles W. Burson has authorized Patricia J. Cottrell, Chief Deputy Attorney General to approve Assurances on his behalf. By entering into this Assurance, Respondent waives any possible objections that the Attorney General did not personally authorize this Assurance.

12. COMPLIANCE WITH OTHER LAWS

12.1 Nothing in this Assurance and Order shall be construed as relieving Respondent of the obligation to comply with any state or federal law, regulation or rule.

13. FILING OF ASSURANCE

13.1 Upon the execution of this Assurance, the Attorney General shall prepare and file in the Chancery Court for Davidson County a Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which it may have to be heard in connection with judicial proceedings upon the Petition. Respondent agrees to pay all costs of filing such Petition, Assurance and Agreed Order. Simultaneously with the execution of this Assurance, Respondent shall execute an Agreed Order. This Assurance is made a part of and is incorporated into the Agreed Order.

14. APPLICABILITY OF ASSURANCE TO RESPONDENT

AND ITS SUCCESSORS

14.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to it, each of its officers, directors, agents, or other entities it controls, manages or operates, its successors and assigns, and to other persons or entities acting directly or indirectly on its or their behalf.

15. COSTS

15.1 All costs associated with the filing and distribution of this Assurance and any other incidental costs or expenses incurred thereby shall be borne by Respondent. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116. Further, no discretionary costs shall be taxed to the State.

16. NOTIFICATION TO STATE

16.1 For five (5) years following execution of this Assurance, Respondent shall notify the Attorney General, c/o Consumer Protection Division, 500 Charlotte Avenue, Nashville, Tennessee 37243-0491, in writing, at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Respondent's status that may

effect compliance with obligations arising out of this Assurance.